A **SANTHI KRISHNAN v. MALAYSIA BUILDING SOCIETY BHD**

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
IDRUS HARUN JCA
PRASAD SANDOSHAM ABRAHAM JCA
B [CIVIL APPEAL NO: A-02-699-04-2014]
7 JANUARY 2015

LAND LAW: *Sale of land – Public auction – Forced sale – Application to set aside and revoke memorandum of sale – National Land Code, s. 256 – Whether successful*
C *bidder complied with conditions of memorandum of sale – Breach of agreement for sale and purchase of property – Whether contract secured under public auction valid and subsisting – Whether appellant as owner and chargor of property has right to annul sale*

EVIDENCE: *Judicial notice – Certificate confirming full payment in sale of land*
D *– Admission of certificate into evidence – Failure by judge to inform parties of discovery of certificate – Whether denied appellant equal opportunity to present case – Matters for which court may take judicial notice – Whether must be subject of common and general knowledge – Whether sufficient notoriety attached to certificate – Whether certificate correctly admitted into evidence – Whether doctrine*
E *of judicial notice applied*

The appellant entered into a sale and purchase agreement ('the agreement') with the respondent for the purchase of a house ('the property'). The appellant made some payments, but failed to settle in full the outstanding balance of RM50,321.23, resulting in the respondent proceeding to sell the
F property by way of a public auction. The successful bidder and the respondent entered into a memorandum of sale of the property in accordance with the condition in para. 12 of the conditions of sale. Subsequently, the appellant filed a notice of application seeking (i) a stay of the execution by the respondent and the bidder of the memorandum of sale of the property
G until final disposal of the application; and (ii) a revocation and setting aside of the said memorandum of sale. The High Court Judge dismissed the application. Hence, the appellant appealed. The appellant averred that the successful bidder failed to comply with the condition stipulated in para. 14 of the conditions of sale which required payment of the balance of the
H purchase price to be made within the permitted time frame of 120 days from the date of the sale of the property. It was the appellant's submission that any failure on the part of the successful bidder to comply with the conditions of sale would cause the memorandum of sale to lapse and become null and void.

Held (allowing appeal)
I **Per Idrus Harun JCA delivering the judgment of the court:**

(1) It is settled law that in a forced sale pursuant to s. 256 of the National Land Code ('NLC'), the chargee at whose instance the sale is effected is to be regarded as the vendor. The order for sale and the conditions

of sale are to be regarded as the sale and purchase agreement. The orders for sale, the conditions of sale and the memorandum of sale constitute a sale and purchase agreement. That being the case, in the event of any breach of the terms of the conditions of sale, the contract secured under the public auction would lapse and become null and void. (paras 11 & 12)

(2) No evidence had been proffered by the respondent in its affidavit that the successful bidder had paid the balance of the purchase price when due. Thus, the successful bidder had failed to do so within the stipulated period stated in para. 14 of the conditions of sale. The successful bidder had thus committed a breach of the agreement for the sale and purchase of the property. The contract which the successful bidder had secured in respect of the sale of the property had lapsed and therefore became null and void. (para 13)

(3) The judge had on his own motion admitted in evidence the Sijil Perakuan Penerimaan Harga Belian ('the certificate') confirming that the respondent had received the whole payment of RM112,000 from the successful bidder three days before the period of 120 days had expired, after taking judicial notice of its existence. If the payment had indeed been made in full, the next course of action to take under the law was for the officer of the court to issue a certificate of sale in Form 16F pursuant to s. 259(3) of the NLC to the successful bidder. However, His Lordship had failed to address the issue whether there was any such certificate issued by the court. Further, the judge should have informed the parties of, or confronted them with, the material discovery of the certificate and allow them to decide what would be their next course of action to take. Justice and fair play should be uppermost in His Lordship's mind. The appellant should have at least been given the opportunity to address the court on the material circumstances that was so crucial to the appellant before the judge proceeded to make any decision on the appellant's application. A denial of this opportunity would tantamount to depriving the appellant an equal opportunity to present his case on a level playing field. (paras 18, 19, 21 & 22)

(4) It is established law that matters for which the court may take judicial notice must be the subject of common and general knowledge and its existence is accepted by the public without qualification or contention. The test is whether sufficient notoriety attaches to the fact involved as to make it proper to assume its existence without proof. In the present case, the certificate was only known to the judge. There was nothing notorious about the certificate. Accordingly, the judge had erroneously admitted the certificate in evidence when the doctrine of judicial notice clearly did not apply. (paras 25 & 27)

(5) Cases must be decided on the evidence and that evidence must be such as is relevant and admissible under the Evidence Act 1950, that is, it must be either from admitted documents or the statement of witnesses or be something of which the court can take judicial notice. The judge could not without giving evidence as a witness import into a case his own personal knowledge of particular facts so as to help out evidence for the respondent which would otherwise be inadequate to rebut the appellant's case. (para 28)

(6) Although the defaulting chargor abdicated his right as a registered owner of the land, *vis a vis* selling it, in favour of the chargee, that was a far cry from saying that a chargor's right to the land vanishes as soon as the auctioneer brings down his hammer. This general proposition did not mean that if an auction sale had been conducted fraudulently, collusively or otherwise improperly to the prejudice of the chargor, he could not intervene to set aside the sale whether or not the purchaser was privy to it. Unless and until the contract of sale had been concluded with the proprietary right conveyed from the vendor to the purchaser, the appellant being the owner and chargor was still an interested party whose rights may be affected or prejudiced due to certain events such as a breach of the contract as was in this case where the resultant effect would be the liability on the appellant to pay the additional interest on his loan. He certainly had the right to come to the court to have the sale annulled and set aside. (para 32)

(7) The court had the power to annul and set aside the memorandum of sale and order for the land to be re-sold where circumstances necessitate the court to do so. Hence, the appellant was entitled to the reliefs sought. The memorandum of sale was therefore revoked and set aside. (paras 32 & 33)

Bahasa Malaysia *Translation Of Headnotes*

Perayu memasuki satu perjanjian jual beli ('perjanjian') dengan responden untuk membeli sebuah rumah ('hartanah'). Perayu telah membuat beberapa pembayaran, tetapi gagal untuk menjelaskan baki yang belum dibayar iaitu RM50,321.23, menyebabkan responden mengambil langkah untuk menjual hartanah itu melalui lelongan awam. Pembida yang berjaya dan responden memasuki satu memorandum jualan hartanah menurut syarat dalam perenggan 12 syarat-syarat jualan. Seterusnya, perayu memfailkan notis permohonon untuk (i) menuntut penggantungan pelaksanaan memorandum jualan oleh responden dan pembida sehingga pelupusan muktamad permohonan; dan (ii) pembatalan dan pengenepian memorandum jualan tersebut. Hakim Mahkamah Tinggi menolak permohonan tersebut. Oleh itu, perayu merayu. Perayu menghujahkan bahawa pembida yang berjaya telah gagal mematuhi syarat yang ditetapkan dalam perenggan 14 syarat-syarat

jualan yang memerlukan pembayaran baki harga belian dibuat dalam tempoh masa 120 hari yang dibenarkan dari tarikh penjualan hartanah itu. Adalah hujahan perayu bahawa apa-apa kegagalan oleh pihak pembida untuk mematuhi syarat-syarat jualan akan menyebabkan memorandum jualan kehilangan haknya dan menjadi tidak sah dan terbatal.

Diputuskan (membenarkan rayuan)
Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

(1) Adalah undang-undang matan bahawa dalam satu jualan paksa menurut s. 256 Kanun Tanah Negara ('KTN'), pemegang gadaian yang atas kehendaknya jualan itu dilaksanakan adalah dianggap sebagai penjual. Perintah jualan dan syarat-syarat jualan adalah dianggap sebagai perjanjian jual beli. Perintah jualan, syarat-syarat jualan dan memorandum jualan merupakan perjanjian jual beli. Oleh itu, sekiranya berlaku apa-apa pelanggaran terma-terma syarat-syarat jualan, kontrak yang dicagarkan di bawah lelongan awam akan kehilangan haknya dan akan menjadi tidak sah dan terbatal.

(2) Tiada keterangan diberikan oleh responden dalam afidavitnya bahawa pembida yang berjaya telah membayar baki harga belian apabila kena dibayar. Oleh itu, pembida yang berjaya telah gagal berbuat demikian dalam tempoh masa yang ditetapkan dalam perenggan 14 syarat-syarat jualan. Pembida yang berjaya telah dengan itu melakukan pelanggaran perjanjian jual beli hartanah. Kontrak yang telah dicagarkan berkenaan jualan hartanah telah kehilangan haknya dan dengan itu menjadi tidak sah dan terbatal.

(3) Hakim bicara telah atas usulnya sendiri menerima masuk dalam keterangan Sijil Perakuan Penerimaan Harga Belian ('perakuan') yang mengesahkan bahawa responden telah menerima keseluruhan bayaran berjumlah RM112,000 daripada pembida yang berjaya tiga hari sebelum tempoh 120 hari luput, selepas mengambil notis kehakiman mengenai kewujudannya. Jika bayaran telah dilaksanakan sepenuhnya, tindakan seterusnya yang sepatutnya diambil di bawah undang-undang adalah untuk pegawai mahkamah mengeluarkan perakuan jualan dalam Borang 16F menurut s. 259(3) KTN kepada pembida yang berjaya. Walau bagaimanapun, hakim bicara telah gagal untuk menangani isu sama ada terdapat perakuan sebegitu yang dikeluarkan oleh mahkamah. Selanjutnya, mahkamah ini berpendapat bahawa hakim sepatutnya memaklumkan kepada pihak-pihak yang terlibat, atau berhadapan dengan mereka dengan penemuan perakuan dan membenarkan mereka untuk memutuskan jalan tindakan yang perlu diambil. Keadilan dan berlaku adil harus diberikan keutamaan oleh hakim bicara. Perayu sepatutnya diberi peluang untuk menghujahkan kepada mahkamah berkenaan keadaan material yang begitu penting kepada perayu sebelum

hakim meneruskan untuk mencapai keputusan atas permohonan perayu. Penafian peluang ini sama seperti menafikan perayu peluang yang setara untuk mengemukakan kesnya pada tahap yang adil dan sama rata.

(4) Adalah undang-undang matan bahawa perkara-perkara yang mana mahkamah boleh mengambil notis kehakiman terhadapnya mesti menjadi hal perkara pengetahuan umum dan am dan kewujudannya diterima oleh pihak awam tanpa syarat atau perbalahan. Ujian adalah sama ada fakta terlibat adalah cukup terkenal menjadikan ia wajar untuk mahkamah menerima kewujudannya tanpa bukti. Dalam kes ini, perakuan tersebut hanya diketahui oleh Yang Arif Hakim. Tiada apa-apa yang terkenal mengenai perakuan itu. Dengan itu, Yang Arif Hakim telah terkhilaf apabila menerima masuk perakuan dalam keterangan apabila doktrin notis kehakiman dengan jelasnya tidak digunapakai.

(5) Kes-kes harus diputuskan atas keterangan dan keterangan itu harus relevan dan diterima masuk di bawah Akta Keterangan 1950, iaitu, ia mestilah sama ada daripada dokumen-dokumen yang diterima masuk atau kenyataan saksi atau menjadi sesuatu yang mahkamah boleh mengambil notis kehakiman. Yang Arif Hakim tidak boleh tanpa memberikan keterangan sebagai saksi mengimport ke dalam kes pengetahuan peribadinya sendiri berkenaan fakta-fakta tertentu untuk membantu keterangan bagi responden yang jika tidak, ia tidak memadai untuk menyangkal kes perayu.

(6) Walaupun penggadai yang ingkar melepaskan haknya sebagai pemilik tanah yang berdaftar, melalui jualannya yang memihak pada pemegang gadaian, itu tidak bermaksud bahawa hak penggadai ke atas tanah terus lesap apabila pelelong memuktamadkan jualan itu. Pernyataan umum ini tidak bermakna jika jualan lelong telah dilaksanakan secara menipu, menurut pakatan sulit atau dengan cara tidak wajar sehingga memprejudiskan penggadai, beliau tidak boleh mengenepikan jualan, sama ada pembeli mengambil bahagian dengannya atau tidak. Melainkan jika dan sehingga kontrak jualan telah dimuktamadkan dengan hak proprietari disampaikan daripada penjual kepada pembeli, perayu sebagai pemilik dan penggadai masih menjadi pihak yang berkepentingan yang haknya mungkin terjejas atau diprejudiskan disebabkan oleh peristiwa tertentu seperti pelanggaran kontrak seperti mana dalam kes ini di mana kesan paduan adalah liabiliti ke atas perayu untuk membayar faedah tambahan ke atas pinjamannya. Dia sudah pasti mempunyai hak untuk datang ke mahkamah untuk membatalkan dan mengenepikan jualan.

(7) Mahkamah mempunyai kuasa untuk membatalkan dan mengenepikan memorandum jualan dan perintah untuk hartanah dijual semula di mana keadaan memerlukan mahkamah untuk berbuat demikian. Oleh itu, perayu berhak untuk relif yang dituntut. Memorandum jualan telah dengan itu dibatalkan dan diketepikan.

Case(s) referred to:

Kuala Lumpur Finance Bhd v. Yap Poh Khian [1992] 1 MLJ 472 ***(refd)***
Lee Chow Meng v. PP [1975] 1 LNS 199 ***(refd)***
Low Moh & Anor v. PP [1953] 1 LNS 51 HC ***(refd)***
M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14 SC ***(refd)***
Malayan United Finance Bhd, Johore Bahru v. Liew Yet Lan [1989] 1 LNS 115 HC ***(refd)***
Mohamed Azmal Noor Naina Mohd Noor v. Arab- Malaysian Finance Bhd & Anor [2003] 2 CLJ 505 CA ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Berhad [1995] 1 CLJ 609 CA ***(refd)***
Norazian Mohd Adnan v. Gale Force Sdn Bhd [2009] 1 LNS 1365 HC ***(refd)***
Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd [1985] 1 LNS 122 SC ***(refd)***
PP v. Lee Ee Teong [1953] 1 LNS 74 HC ***(refd)***
PP v. Sharma Kumari [2000] 3 CLJ 596 HC ***(refd)***
Rajamanikam Adaikalam v. Bolton Finance Bhd [1999] 8 CLJ 491 HC ***(refd)***
Siland Sdn Bhd & Anor v. M & J Frozen Food Sdn Bhd & Anor [1990] 1 CLJ 1227; [1990] 3 CLJ (Rep) 94 HC ***(refd)***
Tenaga Nasional Berhad v. Teobros Development Sdn Bhd [2008] 1 LNS 395 CA ***(dist)***
Woo Chee Meng & Ors v. The Collector of Land Revenue, Lower Perak [1950] 1 LNS 98 HC ***(dist)***
Wong Sze Soon v. Pegawai Pemegang Harta Malaysia & Anor [1995] 4 CLJ 416 HC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 3, 56, 57, 58
National Land Code, ss. 254, 256, 257(1)(g), 258(2), 259(3)
Oaths and Affirmations Act 1949, ss. 4, 5, 6

For the appellant - Jagdave Singh Kuldeep Singh (Amir Faliq Mohamad Jamil with him); M/s Nurul & Charan
For the respondent - Rohaiza Abdul Rois; M/s Tay Ibrahim & Partners

[Editor's note: Appeal from High Court, Ipoh; Civil Suit No: 38-629-07-2012 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Idrus Harun JCA:

[1] On 3 February 2006, the appellant had entered into a sale and purchase agreement (the agreement) with the respondent for the purchase of a house at No. 2, Tingkat Perpaduan 15, Taman Perpaduan, 31150 Ulu Kinta, Perak (the property). One of the terms of the agreement stipulates that the repayment of the housing loan shall be made by monthly instalments of RM400 every month until final settlement.

[2] In an action dated 7 July 2011 in which the respondent herein was the plaintiff, two orders were granted by the High Court on 21 November 2011 (the first order) and 29 August 2012 (the second order). The first order allowed the respondent to sell the property by way of a public auction under

A the direction of the court. The second order fixed the reserve price of the property for the purpose of the sale at RM110,000. The date specified in the second order for the public auction was 29 November 2012. Both orders (the orders for sale) were made as the appellant was alleged to have breached the charge that he had executed in respect of the property which the breach, it B was revealed, he had failed to remedy. The grounds of the breach were set out in the notice of default with respect to a charge (the notice) dated 31 March 2011 issued in Form 16D pursuant to s. 254 of the National Land Code.

[3] The evidence gleaned from the record of appeal reveals that on or C around September 2012, the respondent's representative informed the appellant that the property would be auctioned off on 29 November 2012. The appellant had made some payments, however he had failed to settle in full the outstanding balance of RM50,321.23 as stated in the Notice. The default resulted in due course in the respondent proceeding with the public D auction on 29 November 2012. One Leow Yee Loong was the successful bidder at the public auction.

[4] At the fall of the auctioneer's hammer, both the successful bidder and the respondent entered into a memorandum of sale of the property in accordance with the condition in para. 12 of the conditions of sale. The E successful bidder paid 10% of the purchase price to the respondent with the balance thereof to be settled within the period of 120 days from the date of the sale of the property as stipulated under para 14 of the Conditions of Sale.

[5] On 15 March 2013, the appellant filed a notice of application seeking firstly a stay of the execution by the respondent and the bidder, of the F memorandum of sale of the property dated 29 November 2012 until final disposal of the application, and secondly a revocation and setting aside of the said memorandum of sale. As the first prayer had already been dismissed by the court on 8 May 2013, the hearing before the learned judge was confined to the second prayer only. The learned judge of the High Court dismissed the G application on 26 March 2014. The appellant appeals against that judgment to this court.

[6] The appeal is based on the contention which is confined exclusively to the status of the memorandum of sale which learned counsel on behalf of the appellant had submitted, without doubt correctly, that any failure on the H part of the successful bidder to comply with the conditions of sale would cause the memorandum of sale to lapse and become null and void.

[7] Before we go more closely into the merits of this argument, it is perhaps appropriate to mention at this stage two material points. Firstly, this appeal is not concerned with the validity of the orders for sale and the public I auction of the property. In fact learned counsel for the appellant had made this very clear in his submission on this issue. Secondly, what is apparent from the notes of evidence and the notice of application is that the appellant

is not seeking to set aside the orders for sale. Instead the appellant is merely applying to set aside the memorandum of sale on the ground of non-compliance with the conditions of sale.

[8] The forced sale of the property was made at the instance of the chargee namely the respondent pursuant to s. 256 of the National Land Code. In both his affidavits attested on 7 March 2013 and 22 July 2013, the appellant averred that the successful bidder failed to comply with the condition stipulated in para. 14 of the conditions of sale which required payment of the balance of the purchase price to be made within the permitted time frame of 120 days from the date of the sale of the property the last date being 30 March 2013. The respondent, by way of an affidavit affirmed by its representative on 16 May 2013 denied the appellant's allegation and averred that the auction was in accordance with the law.

[9] Under s. 257 of the National Land Code, every order for sale made by the court under s. 256 thereof is required to be made in Form 16H. One of the terms which must be specified in the order for sale is that the balance of the purchase price shall be settled on a date not later than 120 days from the date of the sale and that no extension of the period so specified is allowed. Once such order has been made, the chargee is required to prepare the conditions of sale in accordance with the terms of the said order and any determination thereunder by the Registrar of the court. This is provided in s. 258(2) of the National Land Code.

[10] The order for sale granted by the court on 21 November 2011 contains the term in question and the same has been incorporated into the conditions of sale in para. 14. The conditions of sale in this regard, also provides in para. 12 that a memorandum of sale must be signed by the successful bidder, the plaintiff or his solicitor and a court official who witnessed the auction on the same day the sale was made.

[11] It is settled law that in a forced sale pursuant to s. 256 of the National Land Code, the chargee at whose instance the sale is effected is to be regarded as the vendor. The order for sale and the conditions of sale are to be regarded as the sale and purchase agreement (see *Malayan United Finance Bhd, Johore Bahru v. Liew Yet Lan* [1989] 1 LNS 115; [1990] 1 MLJ 317 and *Mohamed Azmal Noor Naina Mohd Noor v. Arab- Malaysian Finance Bhd & Anor* [2003] 2 CLJ 505; [2003] 4 MLJ 447).

[12] Having stated the law, there is not the slightest room for doubt that, in the case before us, the orders for sale, the conditions of sale and the memorandum of sale constitute a sale and purchase agreement. That being the case, in the event of any breach of the terms of the conditions of sale, the contract secured under the public auction would lapse and become null and void. In the case of *Wong Sze Soon v. Pegawai Pemegang Harta Malaysia & Anor* [1995] 4 CLJ 416; [1995] 3 MLJ 57, the plaintiff who was the successful bidder at a public auction pursuant to foreclosure proceedings,

failed to pay the full balance of the purchase price within the time stipulated in the terms and conditions of the sale. The High Court held that without such payment, the contract secured by the plaintiff under the public auction lapsed and thus became null and void (see also *Rajamanikam Adaikalam v. Bolton Finance Bhd* [1999] 8 CLJ 491 and *Norazian Mohd. Adnan v. Gale Force Sdn Bhd* [2009] 1 LNS 1365; [2009] 6 MLRH 830).

[13] In the instant case, the appellant had alleged that the successful bidder did not pay the balance of the purchase price in respect of which he was obliged to do so within the stipulated period of 120 days and the respondent merely denied the said allegation. No evidence had been proffered by the respondent in its affidavit that the successful bidder had actually paid the full balance of the purchase price of the property. In the absence of any evidence to show that the successful bidder had paid the balance of the purchase price when due, we must accordingly hold that the successful bidder had failed to do so within the stipulated period stated in para. 14 of the conditions of sale. The successful bidder had thus committed a breach of the agreement for the sale and purchase of the property. Under the circumstances the contract which the successful bidder had secured in respect of the sale of the property had lapsed and therefore become null and void.

[14] We pause to observe at this point that the respondent had never made any attempt to rebut the appellant's contention that the successful bidder had not paid the full balance of the purchase price, it had instead meekly resisted the application by insisting that the orders for sale and the public auction were valid. Further, we glean from the notes of the proceedings and the respondent's written submission that learned counsel for the respondent did not address the issue of the failure to pay the balance of the purchase price by the successful bidder. We think the respondent's explanation in its affidavit and the submission made on its behalf are wholly misconceived for the simple reason that at no time did the appellant question the validity of both the orders for sale and the public auction in respect of the property.

[15] It is important to note that the only information as regards the payment by the successful bidder was given by counsel from the Bar on behalf of the respondent during the hearing of the appellant's notice of application on 3 March 2014. There was no evidence under oath given by the respondent. In our judgment this is not a proper way to reply to the appellant's positive assertion made on oath. This is certainly not evidence within the meaning of that word in s. 3 of the Evidence Act 1950 (Act 56) read with ss. 4, 5 and 6 of the Oaths and Affirmations Act 1949 (Act 194). In *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609; [1995] 1 MLJ 281, the Court of Appeal held as follows:

> It is a principle fundamental to the system of adversarial litigation that evidence upon a matter must be given on oath whenever there is a delay, it is for the plaintiff to give an explanation by affidavit, even before the point is taken by the other side. In this case, the explanation for the

respondent's delay was given by counsel from the Bar and not by the respondent under oath. The proper way to reply the appellants' positive assertion on oath that there had been inordinate delay was by way of an affidavit in answer.

[16] Likewise in the present case before us, the proper way to rebut the appellant's positive assertion under oath should appropriately be by way of an affidavit by the respondent or the successful bidder. Both the respondent and the successful bidder had ample opportunity to do so yet they, the respondent in particular, chose not to do it. In fact in this regard, we are mindful of the fact that the successful bidder is not a party to this action, however the notice of application was served on him.

[17] It is manifestly clear therefore that the respondent had failed to contradict the positive assertion upon the material issue made by the appellant. In law the respondent must be taken to have admitted the fact so asserted. Gopal Sri Ram, JCA in *Ng Hee Thoong & Anor v. Public Bank Berhad, supra* said:

It is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict is usually treated as an admission by him of the fact so asserted.

[18] This finding should be sufficient to dispose of this appeal. Nevertheless, the next point raises a question which compels this court to consider this appeal further. The question concerns the finding of the learned judge in relation to the "Sijil Perakuan Penerimaan Harga Belian" (the Certificate) which His Lordship had come across upon perusal of the documents in the court's file. The Certificate according to the learned judge was filed by the respondent and confirmed that the respondent had received the whole payment of RM112,000 from the successful bidder on 27 March 2013 which was three days before the period of 120 days had expired.

[19] The learned judge thereupon took judicial notice of the Certificate and admitted it in evidence. Based on the Certificate the learned judge made a finding that the successful bidder had paid the balance of the purchase price before the expiry of the period of 120 days in compliance with the condition set out in para. 14 of the conditions of sale. The learned judge then proceeded to consider the condition in para. 16 of the conditions of sale which required the respondent or its solicitor to submit to the court a certificate in writing in respect of the payment of the balance of the purchase price together with a copy of the receipt of payment.

[20] We assume, in the absence of any conclusive evidence, that this Certificate is the Certificate which the learned judge had found in the court's file even though His Lordship did not mention whether a copy of the receipt of payment was attached to it. After accepting that the Certificate was filed long after the period of seven days had expired which was, undoubtedly, in

breach of para. 16 of the conditions of sale, His Lordship ruled that the condition in the said paragraph was merely an administrative requirement without any statutory force as it was based on the Proclamation of Sale in Annexure 2, to the Practice Directions of the Registrar of the High Court No. 1/2013 dated 29 January 2013. This, according to His Lordship, was contrary to the condition in para. 14, which the learned judge rightly mentioned was a mandatory requirement with statutory force as it was based on s. 257(1)(g) of the National Land Code. This reasoning, assumes as we understand it, that since the condition in para. 16 is merely an administrative requirement, the breach thereof is insignificant and would not cause the contract to lapse. But His Lordship, with the greatest respect, overlooked the purpose for which the said condition was provided. In our opinion, the manifest object and intent of this condition is to ensure that the sale of the property could be concluded with sufficient promptitude so that the chargee would recover the outstanding balance of the loan, the successful bidder would get the property that he had successfully bid and that the financial burden on the appellant of having to pay additional interest for the loan due to any inordinate delay could be lessened.

[21] In the face of this revelation several pertinent questions have emerged. Firstly an important point to note is that the Certificate bears a date of 30 September 2013 which is six and half months after the appellant filed this notice of application. Secondly, no one, not even the learned judge seemed to be aware of the fact of the existence of the Certificate when the proceedings in respect of the notice of application were in progress. Next, if the respondent had filed the Certificate as the learned judge had stated, why didn't the respondent affirm an affidavit confirming the payment, exhibiting the Certificate and explaining the delay. It would be somewhat perplexing for the respondent not to take this logical and correct step and submit on this crucial issue while facing the prospect of the sale of the property being declared null and void. If the payment had indeed been made in full, the next course of action to take under the law was for the officer of the court to issue a certificate of sale in Form 16F pursuant to s. 259(3) of the National Land Code to the successful bidder. However, His Lordship failed to address the issue whether there was any such Certificate issued by the court.

[22] In our judgment and with deference to the learned judge, His Lordship should not deviate from the judge's scope of judicial functions and import into the case his own personal knowledge of particular facts. It would be more proper in all the circumstances of this case for the learned judge in the general exercise of his judicial functions, to leave it to the parties to handle their own case and determine the course of action they deem appropriate to pursue. We think the learned judge should have informed the parties of, or confronted them with, the material discovery of the Certificate and allow them to decide what would be their next course of action to take such as taking those appropriate steps based on the questions we have raised in the preceding paragraph. Justice and fair play should be uppermost in His

Lordship's mind for in the context of this case, it dictates that the parties, in particular the appellant, should have at least been given the opportunity to address the court on the material circumstance that is so crucial to the appellant before the learned judge proceeded to make any decision on the appellant's application. A denial of this opportunity would, in our view tantamount to depriving the appellant an equal opportunity to present his case on a level playing field.

[23] The learned judge as we have stated above, had on his own motion admitted the Certificate in evidence after taking judicial notice of its existence. For the appellant, it was submitted that the learned judge had erroneously admitted the Certificate in evidence as it only existed and in fact was filed on 30 September 2013. The respondent did not exhibit the Certificate in the affidavit that it had filed.

[24] In law, only facts which are admitted or of which the court will take judicial notice need not be proved. These two classes of facts are each found in ss. 56 and 58 of the Evidence Act 1950 (Act 56). The general rule is that all facts in issue and relevant facts must be proved by evidence (see *Pembangunan Maha Murni Sdn. Bhd. v. Jururus Ladang Sdn. Bhd.* [1985] 1 LNS 122; [1986] 2 MLJ 30). Section 56 of the Evidence Act 1950 deals with facts that the court will take judicial notice while s. 57 enumerates facts which the court shall take judicial notice. As regards s. 57, we are satisfied that the Certificate does not fall within any of the class of facts which the court shall take judicial notice. It is necessary therefore to consider whether the fact relating to the Certificate falls under s. 56 of the Evidence Act 1950.

[25] It is established law that matters for which the court may take judicial notice must be the subject of common and general knowledge and its existence is accepted by the public without qualification or contention. The test is whether sufficient notoriety attaches to the fact involved as to make it proper to assume its existence without proof (see *Lee Chow Meng v. Public Prosecutor* [1975] 1 LNS 199; [1976] 1 MLJ 287). This is done upon the request of the party seeking to rely on the fact in issue. Facts which are admitted under judicial notice are accepted without any necessity to be formally proved by a witness.

[26] The learned judge, in taking judicial notice of the existence of the Certificate relied on two cases. The first case is *Woo Chee Meng & Ors v. The Collector of Land Revenue Lower Perak* [1950] 1 LNS 98; [1950] 1 MLJ 262. In that case the court took judicial notice of the facts stated in the statement made by the Collector which he was required to state under s. 23 of the Land Acquisition Enactment when making a reference to the High Court. *Woo Chee Meng's* case in our opinion, can be distinguished from the present case as there the statement was referred to and argued by the parties in the course of the trial and it was made as a statutory requirement under s. 23 of the Land Acquisition Enactment for the purpose of the land reference before the High Court. In the case before us, there was no evidence to show that the parties

were aware of the existence of the Certificate and no arguments were made urging the court to take judicial notice of the same and admit it in evidence. Thus *Woo Chee Meng*'s case is of little assistance to justify His Lordship's treatment of the Certificate by applying the doctrine of judicial notice.

[27] The second case relied on by the learned judge was *Tenaga Nasional Berhad v. Teobros Development Sdn. Bhd.* [2008] 1 LNS 395. However, the learned judge of the High Court in that case quite clearly said that "what was indisputable, what was notorious and what was known to the community would attract the doctrine of judicial notice". While admittedly, His Lordship in the instant case did refer to the above passage, His Lordship, with due respect, obviously failed to appreciate and comprehend the significance of that statement which in fact had laid down the correct principle and test for the doctrine to apply. Reverting to the present appeal, the Certificate was only known to the learned judge. There was nothing notorious about the Certificate. The instant case, in our view does not pass this test. Accordingly we hold that the learned judge had erroneously admitted the Certificate in evidence when the doctrine of judicial notice clearly does not apply.

[28] It is an elementary proposition of law, that cases must be decided on the evidence and that the evidence must be such as is relevant and admissible under the Evidence Act 1950, that is, it must be either from admitted documents or the statement of witnesses or be something of which the court can take judicial notice. The learned judge cannot without giving evidence as a witness import into a case his own personal knowledge of particular facts so as to help out evidence for the respondent which would otherwise be inadequate to rebut the appellant's case (*PP v. Sharma Kumari* [2000] 3 CLJ 596; [2000] 6 MLJ 254; *Low Moh & Anor v. Public Prosecutor* [1953] 1 LNS 51; [1954] MLJ 14 and *Public Prosecutor v. Lee Ee Teong* [1953] 1 LNS 74; [1953] 1 MLJ 244).

[29] The learned judge had, in connection with the condition in para. 16 of the conditions of sale, decided that it had no statutory force adding that the condition in para. 16 was based on the Practice Directions No. 1/2013 dated 29 January 2013. In our opinion the applicable Practice Directions should be the Practice Directions Of The Registrar Of The High Court No. 1/2011. This is because when the property was auctioned off on 29 November 2012 the said Practice Directions of No. 1/2013 was non-existent. However, the condition in para. 16 of Annexure C to the earlier Practice Directions is identical with para. 16 of Annexure 2 to the Practice Directions No. 1/2013.

[30] We should say that while it may be true that para. 16 of the conditions of sale is not based on any legal provision of the National Land Code, it must be remembered that s. 258(2) of the National Land Code requires the chargee to prepare the conditions of sale in accordance with the terms of the order for sale and any determination thereunder by the Registrar of the court

(see *Malayan Union Finance Bhd, Johore Bahru v. Liew Yet Lan, supra*). Thus even though the conditions for sale is based on the Practice Directions of the Registrar of the High Court, in law it is made by the chargee pursuant to s. 258(2) of the National Land Code. The Practice Directions are intended to facilitate the imposition of the term and conditions of sale and ensure consistency and uniformity of practice by the High Court throughout Peninsula Malaysia. But the conditions of sale derives its legal force from s. 258(2) and the order for sale made pursuant to ss. 256 and 257 of the National Land Code.

[31] Even if we are wrong in this regard, the conditions of sale and the orders for sale, as we have stated earlier in our judgment, constitute the sale and purchase agreement. A breach of any of the conditions set out in the conditions of sale including the condition in para. 16 would cause the contract secured by the respondent under the public auction to lapse and thus become null and void (see *Wong Sze Soon v. Pegawai Pemegang Harta Malaysia & Anor, supra and Rajamanikam Adaikalam v. Bolton Finance Bhd., supra).*

[32] There remains the question whether the court was *functus officio* after it had made the orders for sale in foreclosure proceedings when the order had been drawn up and perfected. The court has no power to vary or set aside the order made. Accordingly the respondent's counsel argued, the court had no power to annul the auction unless the appellant fully satisfied the whole debt claimed. It would suffice for us to say, in answer to this argument, that the appellant is not seeking the annulment or setting aside of the order for sale. All that the appellant is asking is for the memorandum of sale to be annulled and set aside. In our judgment the court has power to annul and set aside the memorandum of sale and order for the land to be resold where circumstances necessitate the court to do so. In the instant appeal, we have already delved into the reasons leading to our finding that the contract which the successful bidder had secured pursuant to the sale had lapsed and become null and void. We are mindful of the fact that the defaulting chargor abdicates his right as registered owner of the land, *vis-a-vis* selling it, in favour of the chargee *(Malayan United Finance Bhd, Johore Bahru v. Liew Yet Lan, supra).* However, that is a far cry from saying that a chargor's right to the land vanishes as soon as the auctioneer brings down his hammer. This general proposition does not mean that if an auction sale has been conducted fraudulently, collusively or otherwise improperly to the prejudice of the chargor, or if we may add, if the contract for the sale of the property had lapsed due to a breach, he cannot intervene to set aside the sale whether or not the purchaser is privy to it (*Siland Sdn Bhd & Anor v. M & J Frozen Food Sdn Bhd & Anor* [1990] 1 CLJ 1227; [1990] 3 CLJ (Rep) 94; [1990] 2 MLJ 502 and *Kuala Lumpur Finance Bhd v. Yap Poh Khian* [1992] 1 MLJ 472). Each party to the contract of sale had to perform his part of the obligation and until then, no executed or actual sale would have been concluded (see

A *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn. Bhd & Anor* [1994] 2 CLJ 14; [1994] 1 MLJ 294 (SC)). In our judgment until and unless the contract of sale has been concluded with the proprietary right conveyed from the vendor to the purchaser, the appellant being the owner and chargor is still an interested party whose rights may be affected or prejudiced due to certain
B event such as a breach of the contract as is in this case where the resultant effect would be the liability on the appellant to pay additional interest on his loan. He certainly has the right to come to the court at this stage to have the sale annulled and set aside.

[33] On a critical examination of the whole of the evidence and for the
C reasons discussed, we accordingly at the conclusion of this appeal hold that the appellant is entitled to the reliefs sought. The memorandum of sale is revoked and set aside. The appeal is allowed and the judgment of the High Court is set aside. There is no order as to costs. The deposit shall be refunded to the appellant.

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